No. 75-1916

In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK BALLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court issued no written opinion. The opinion of the court of appeals (Pet. App. A) is reported at 535 F. 2d 400.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on April 28, 1976, and a petition for rehearing, with suggestion for rehearing *en banc*, was denied on June 2, 1976 (Pet. App. C). The petition for a writ of certiorari was filed on July 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of petitioner's failure to report a substantial amount of gross receipts from a truck rental business was sufficient to support his conviction for filing

a false income tax return under Section 7206(1) of the Internal Revenue Code of 1954, where the business had no cost of goods sold, so that its gross receipts were equal to its gross income.

2. Whether petitioner was entitled to a lesser-included offense instruction for failure to supply information under Section 7203.

STATUTE INVOLVED

Sections 7203 and 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.), as amended, provide:

> SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.
>
> SEC. 7206. FRAUD AND FALSE STATEMENTS.
>
> Any person who—
>
> (1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *
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> * * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of willfully filing false income tax returns for 1969 and 1970, in violation of Section 7206(1). The court imposed concurrent three-year prison terms on each of the two counts and fined petitioner $2,000 on each count. The court of appeals affirmed the conviction with respect to 1969 and reversed as to 1970 (Pet. App. A).

The first count of the indictment alleged that petitioner reported gross income from wages for 1969 of only $10,407, even though he "knew and believed he received substantial income in addition to that heretofore stated." The second count alleged that for 1970 petitioner reported gross income from wages of only $20,730, although he "knew and believed he received substantial income in addition to that." At trial, the government showed that petitioner had unreported receipts of $15,300 in 1969 and $3,222.52 in 1970 from his used auto parts business, unreported receipts of almost $39,000 in 1969 from his truck leasing business, and unreported miscellaneous rents and commissions of $1,180 in 1969 and $2,550 in 1970 (Pet. App. A-3 to A-4).

The evidence adduced at trial may be summarized as follows: During 1969 and 1970, petitioner engaged in two business ventures, a scrap metal and motor vehicle parts business, known as Ballard Auto Parts and Ballard Iron & Metal Company, and a tractor-trailer rental business, known as City Leasing & Drayage Company (Pet. App. A-3).[1] Petitioner filed individual income tax returns for 1969 (Govt. Ex. 1) and for 1970 (Govt. Ex. 2), but did not

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[1]The tractor-trailer rental business was incorporated on July 18, 1969, and its operations after that date did not enter into the government's computation of petitioner's gross income (Pet. App. A-3).

attach a Schedule C (Profit (or Loss) From Business or Profession) to either return (Pet. App. A-3). On his 1969 return, petitioner reported as income only wages received from City Leasing & Drayage Company in the sum of $10,407 (Tr. 15-16).[2] His 1970 return reported as income only wages of $20,730 from City Leasing and from Metropolitan Towing Company (Tr. 16-17).

During the trial, the government called as witnesses the customers of Ballard Auto Parts and Ballard Iron & Metal Company. These customers testified that they had paid a total of $15,300 to that company for motor vehicle parts and salvage, commission income of $330, and rental income of $850 (Pet. App. A-3 to A-4).

In its investigation of City Leasing & Drayage Company to the date of its incorporation on July 18, 1969, the government discovered deposits to its bank account of almost $46,000. In its analysis of these bank deposits, the government attributed approximately $7,000 to non-income items and attributed the balance of almost $39,000 as gross income of that company's leasing business (Pet. App. A-4). During petitioner's cross-examination of the government agent who testified as to the analysis of the bank deposits, the trial court refused to permit questioning as to the amount of business expenses for the leasing business reflected by disbursements from the account (Tr. 576-581). The court did indicate, however, that petitioner could call the agent as a hostile witness in the presentation of his defense (Tr. 584).

For 1970, the government established that petitioner's salvage business had received $3,222.52 for sales of salvage and motor vehicle parts to customers, and $2,550 in rental income from third parties, none of which had been reported by petitioner on his tax return (Pet. App. A-4).

[2] "Tr." references are to the transcript of trial proceedings.

Petitioner testified on his own behalf and related that his business records had been destroyed in a fire. He also stated that his businesses had sustained losses during 1969 and 1970 and that his bookkeeper had told him there was no point in claiming the losses on his tax returns because he could not produce records substantiating the losses (Pet. App. A-4).

The court of appeals affirmed petitioner's conviction for 1969 and reversed and remanded the case for a new trial with respect to the charge for 1970. In upholding the conviction for 1969, the court ruled that the proof that petitioner failed to report a substantial amount of gross receipts from two separate businesses was sufficient to support the charge of filing a false tax return for that year. Although the court acknowledged that gross receipts were not equivalent to gross income in a merchandising business (because in that type of business gross income equals gross receipts minus cost of goods sold), it concluded that the distinction between gross receipts and gross income was irrelevant with respect to petitioner's leasing business because there was no cost of goods sold in that enterprise. Thus, it held that the proof of $39,000 of unreported gross receipts from that business in 1969 was sufficient to demonstrate the falsity of petitioner's return for that year because those receipts were part of his gross income as defined by Section 61 of the Internal Revenue Code (Pet. App. A-8).

However, the court of appeals reversed petitioner's conviction for 1970 "in the interests of justice" because the trial court failed to instruct the jury that in a merchandising business gross income means gross receipts less cost of goods sold. For that year, petitioner's gross receipts were principally from the sale of auto parts, a business in which cost of goods sold would have to be taken into ac-

count (Pet. App. A-9 to A-11).[3] Although petitioner did not request such an instruction defining gross income, the court of appeals ruled that its omission by the trial court was plain error (Pet. App. A-11).

ARGUMENT

1. Petitioner's challenge to his conviction for filing a false income tax return for 1969 rests principally upon his contention (Pet. 10-12) that he sustained a loss from his businesses for that year and that there is no requirement that a loss be reported on the Schedule C attachment to the individual income tax return. In essence, petitioner argues that because his business losses would have reduced his tax liability, he was free to omit both the gross income and those losses from his return.

But the conduct proscribed by Section 7206(1) is the willful filing of a tax return by a person who does not believe it to be correct as to every material matter. The purpose of the statute is to insure the accurate reporting of all information necessary to enable the Internal Revenue Service to make an independent verification of a taxpayer's tax liability. Thus, if the taxpayer willfully fails to report any item that is necessary to a computation of his tax liability, the statute is violated without regard to the tax consequences of the omission. See, *e.g.*, *United States* v. *Engle*, 458 F. 2d 1017, 1019 (C.A. 8), certiorari denied, 409 U.S. 875; *Siravo* v. *United States*, 377 F. 2d 469, 472 (C.A. 1). *United States* v. *Lodwick*, 410 F. 2d 1202, 1205-1206 (C.A. 8), certiorari denied, 396 U.S. 841; *United States* v. *DiVarco*, 484 F. 2d 670, 673 (C.A. 7), certiorari denied, 415 U.S. 916.[4]

[3]For 1970, petitioner had $3,222.52 of unreported gross receipts from his used auto parts business and $2,550 of unreported miscellaneous rents and commissions (Pet. App. A-4).

Although petitioner attempts to characterize his conduct as nothing more than an omitted business loss deduction, the evidence amply established that he failed to report more than $39,000 in gross receipts from a truck rental business. Petitioner's unverified claims that the deductible expenses of this business exceeded its gross receipts demonstrate the fact that his willful failure to report both the receipts and disbursements of this business was the omission of material matters within the compass of Section 7206(1). Indeed, if taxpayers were able to omit such information from their returns and conceal the nature and amount of their business expenses, they could effectively insulate themselves from audit by the Internal Revenue Service and prevent disallowance of their claimed deductions. The criminal sanction of Section 7206(1), covering the willful filing of a false return, is designed to deter such conduct.

2. Petitioner further argues (Pet. 12-19) that his conviction was improper because the evidence only demonstrated his failure to report gross receipts and not gross income. In petitioner's view, the government was required to account for his legitimate business expenses and cost of goods sold.

[4]Contrary to petitioner's argument (Pet. 12-13, 15-16), the decision below does not conflict with *Siravo* v. *United States*, *supra*, or *United States* v. *Morse*, 491 F. 2d 149 (C.A. 1). *Siravo* holds that proof of gross receipts will be proof of gross income where, as in the case of the petitioner's salvage business, there is no evidence from which a cost-of-goods-sold figure can be computed (see 377 F. 2d at 473-474). *Morse* simply holds that in computing gross income through use of the bank deposits method of proof, the government must exclude all deposits which do not constitute gross income and have competent proof of the excluded amounts. Here, however, the gross receipts of petitioner's trailer leasing business were equivalent to its gross income. Hence, the decision below is fully in accord with *Morse*.

There is, however, no requirement that the government introduce such evidence in a prosecution for filing of a false return. The indictment charged petitioner with the failure to report "substantial income," which the court of appeals held to be unreported gross income. Business expenses are deductible from gross income to arrive at taxable income (see Sections 63(a), 161 and 162 of the Code) and play no part in the computation of gross income, which Section 61(a)(2) of the Code defines for these purposes as "[g]ross income derived from business." Since petitioner was charged with failing to report gross income, his business expenses were therefore irrelevant to the offense of filing a false return.[5]

Moreover, as the court of appeals correctly stated (Pet. App. A-8), the deduction for cost of goods sold applicable to a merchandising business had no relevance to petitioner's truck leasing business. See Treasury Regulations on Income Tax (1954 Code), Section 1.61-3(a) (26 C.F.R.). Accordingly, the government's proof of unreported gross receipts from the leasing business necessarily established unreported gross income and the falsity of petitioner's return.[6]

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[5]Thus, contrary to petitioner's argument (Pet. 15), the trial court did not err in precluding cross-examination of the government agent as to the business expenses of the leasing business as revealed by the bank account records. In any event, the court indicated that petitioner could call the agent as a hostile witness during the presentation of his defense.

[6]Petitioner relies (Pet. 17) on the phrase "cost of goods sold *and/or operations*" (emphasis supplied) on the Schedule C form in support of his argument that the deduction encompasses expenses for labor and materials in a service business. But the instructions for the preparation of Schedule C for 1969 expressly indicate that the computation of "cost of goods sold and/or operations" only applies to a trade or business in which the production, purchase, or sale of merchandise is an income-producing factor. Thus, the deduction for cost of goods sold is not applicable to petitioner's trailer leasing business. Although that business would be eligible for deductions such as for depreciation, depreciation is not a cost of goods sold but a business deduction from adjusted gross to taxable income.

3. Finally, petitioner contends (Pet. 12) he was entitled to a lesser-included offense instruction under Section 7203, which punishes, *inter alia*, the failure to make a return or the failure to supply information. Apart from the fact that he requested no such instruction at trial, a lesser-included offense instruction was not appropriate here. Such an instruction is only proper where the greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. *Sansone* v. *United States*, 380 U.S. 343, 350.

Section 7206(1) punishes anyone who willfully makes and subscribes any return that contains or is verified by a written declaration that it is made under the penalties of perjury and that he does not believe to be true and correct as to every material matter. Section 7203 punishes anyone who is required to make a return or to supply information and who willfully fails to make such a return or to supply such information. Since the charged greater offense under Section 7206(1) involved the same factual elements for conviction of the lesser Section 7203 offense, there was no state of facts upon which the jury could have convicted petitioner of failure to supply information without finding him guilty of filing a false return. Given the fact that both statutes employ the same standard of willfulness, a lesser-included offense instruction was not appropriate. See *United States* v. *Bishop*, 412 U.S. 346.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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